INDEX

724-601—64——1

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 367

UNITED STATES OF AMERICA, APPELLANT

v.

CONTINENTAL CAN COMPANY AND HAZEL-ATLAS GLASS COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court, comprising its findings of fact and conclusions of law (R. 1574–1654), is reported at 217 F. Supp. 761.

JURISDICTION

The judgment of the district court was entered on April 16, 1963 (R. 1654),[1] and the notice of appeal was filed by the United States on June 14, 1963 (R. 1655). This Court noted probable jurisdiction on

[1] "R." refers to the record printed in this Court. "GX" refers to the government's exhibits, and "DX", to defendants' exhibits. In the appendix, pp. 55–58, *infra*, we list the places in the record at which each cited exhibit was admitted in evidence.

October 28, 1963 (R. 1656; 375 U.S. 893). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29.

QUESTIONS PRESENTED

The main question is whether the evidence presented by the government established that a merger eliminating substantial competition between Continental Can Co., the second largest metal container maker, and Hazel-Atlas Glass Co., the third largest glass container maker, violates Section 7 of the Clayton Act. Subsidiary questions are:

1. Whether the government's proof that this merger eliminated substantial competition in the entire range of uses for which glass and metal containers compete and that each of the merging companies had a dominant position in a highly concentrated industry was sufficient to render the merger illegal under Section 7 of the Clayton Act.

2. Whether the elimination of competition between the merging firms and the increased concentration in the production of containers for food canning made the merger illegal under Section 7 of the Clayton Act.

STATUTE INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the

Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

STATEMENT

This is a civil action brought by the United States challenging, under Section 7 of the Clayton Act, the acquisition by Continental Can Company, Inc. ("Continental") of Hazel-Atlas Glass Company ("Hazel-Atlas").

Prior to instituting this action, the United States, on learning of Continental's plans to acquire Hazel-Atlas, sought to prevent the proposed merger under a 1950 consent judgment, which had been entered in a suit charging price-fixing and lease tie-in arrangements and which barred Continental from acquiring any "container" manufacturers.[2] In August 1956, the United States District Court for the Northern District of California, finding that the term "container" as used in the judgment did not encompass glass containers, held that the consent decree did not cover the proposed acquisition.[3]

The United States thereupon commenced this action on September 10, 1956, moved for a preliminary injunction, and sought a temporary restraining order

[2] *United States* v. *Hartford-Empire Co.*, 46 F. Supp. 541 (N.D. Ohio), affirmed in part, reversed in part, 323 U.S. 386.

[3] *United States* v. *Continental Can Co.*, 143 F. Supp. 787 (N.D. Cal.) (R. 1575).

pending the hearing and determination of that motion. The motion for a temporary restraining order was denied on September 13, 1956, the district court stating that "should the acquisition be ultimately held violative of the Clayton Act, plaintiff's relief may be accomplished by a decree of divestiture".[4] On that day, Continental acquired all of the assets, properties, business, and good will of Hazel-Atlas in exchange for 999,140 shares of Continental common stock and the assumption by Continental of all the liabilities of Hazel-Atlas (R. 13).

After extensive discovery proceedings by both parties, trial began in June 1960 (R. 14). At the conclusion of the government's case, on October 19, 1960, defendants moved to dismiss the complaint (R. 1564). On December 8, 1960, the district court, in a brief oral statement, indicated that it had decided to grant the motion and that its written findings and opinion, as well as the judgment, would follow (R. 1565–1574). No opinion or findings were rendered before June 25, 1962, when this Court announced its decision in *Brown Shoe Company* v. *United States*, 370 U.S. 294. The government thereupon requested the district court to reconsider its oral opinion in light of the *Brown Shoe* decision (R. 1576).

On April 16, 1963, the district court issued its written opinion incorporating findings of fact and conclusions of law, and granting defendants' motion for judgment (R. 1574–1654).

[4] Memorandum Order, September 13, 1956.

1. THE MERGING COMPANIES

(a) Continental, a New York corporation, was organized in 1913 to acquire all the assets of three metal container manufacturers (GX 786; R. 2837). By 1921, Continental was the second largest manufacturer of metal containers in the United States (exceeded only by American Can Company) and was several times larger than the third-ranking firm, United States Can Company. Soon thereafter, Continental commenced an extensive series of acquisitions. Between 1927 and 1929 it acquired 16 domestic companies, including the third-ranking United States Can Co.[5] More recent acquisitions have marked its further expansion. (GX 786; R. 2849–2863). Its latest acquired metal container firm was the Owens-Illinois Can Co., a subsidiary of Owens-Illinois Glass Co., which it purchased in 1944, thereby terminating the one serious attempt by a glass container firm to enter the metal container business (GX 785; R. 91, 100, 2831–2834, 2863). At the time this action was commenced, Continental had acquired a total of 21 domestic companies in the metal container field and a large number engaged in other aspects of packaging. This latter group includes seven producers of flexible packaging; one manufacturer of

[5] GX 786, R. 2839–2848; "Profits in Cans", *Fortune*, April 1934, p. 81. Although negotiations were also conducted regarding a merger with Owens-Illinois Glass Corporation, the largest glass container manufacturer, collapse of the stock market in 1929 aborted these plans. Hession, *Competition in the Metal Food Container Industry (1916–1946)* (1948), pp. 53–54.

polyethylene bottles and similar plastic containers; 14 producers of paper containers and paperboard, including fibre drums, folding boxes, and corrugated shipping containers; four (including Hazel-Atlas) making closures for glass containers; seven producing a miscellany of products; and one, Hazel-Atlas, producing glass containers.[6]

By 1955, prior to this merger, Continental had total assets of $382 million and operated 72 domestic plants, of which 30 had been obtained through acquisitions (GX 785, 786, 900, 1211; R. 2829–2863, 3049–3050, 3278). In that year, Continental shipped approximately 33 percent of all metal containers sold in the continental United States, and was the second largest company in the field. The leading producer, American Can Company, shipped 40 percent of the total. These two leading companies thereby ac-

[6] (GX 785, 786; R. 2829–2863) As stated in the leading work on the industry, Continental has "expanded tremendously through a series of mergers and outright purchases of other concerns," while American Can's growth, during the last 30 years, has been "largely internal". Hession, *Competition in the Metal Food Container Industry, 1916–1946* (1948), p. 51. Continental's acquisitions until 1946 are described at pp. 51–58 of this work. American Can's pre-1908 acquisitions had brought together a large portion of the industry in what was found to be an attempt to monopolize. *United States* v. *American Can Co.*, 230 Fed. 859 (D. Md. 1916), decree rendered, 234 Fed. 1019, appeal dismissed, 256 U.S. 706 (1921). Sources for the history and competitive conditions of the metal can industry are Hession, *supra;* Hession, "The Metal Container Industry" in Adams ed., *The Structure of American Industry* (3d ed. 1961), chap. 12; Whitney, *Antitrust Policies: American Experience in Twenty Industries* (1958), Vol. II, chap. 16; McKie, *Tin Cans and Tin Plate* (1959).

counted for approximately 73 percent of all metal containers. The third largest manufacturer, National Can Company, shipped about 5 percent. The remaining 24 percent of this market was shared by 75 to 90 other firms (R. 412–413, 1590; GX 801; R. 2962).

According to Continental, the acquisition of Hazel-Atlas was part of its program to develop a complete line of containers (GX 900, 1212; R. 3048–3049, 3293–3295, 3300–3306). A few weeks after its acquisition of Hazel-Atlas in September 1956, Continental acquired the Robert Gair Company, Inc., a leading manufacturer of paper and paperboard products (GX 1212; R. 3293–3296, 3302–3303).[7] Earlier in the same year, Continental had also acquired the White Cap Company, a leading producer of vacuum-type metal closures for glass food containers (GX 1211; R. 3267–3268, 3282).[8] At that time, Continental also contemplated entry into the beverage bottle field, which was to be facilitated by the acquisition of another glass

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[7] Gair had net sales in 1955 of $160.2 million and assets of $134.9 million. It was "a leading producer of folding cartons, shipping containers, paperboard, and other paper products" (GX 1212; R. 3294. See R. 3302–3303). On October 30, 1956, the United States filed another complaint against Continental alleging that this acquisition violated Section 7 of the Clayton Act (R. 3231).

[8] White Cap shipped approximately 18.5 percent of all types of metal closures made from tin plate in that year (GX 803; R. 3030). As the district court noted, two years later, when such figures became available, it was determined that White Cap had accounted for approximately 60 percent of the production and shipment of all vacuum closures made from tin plate (GX 803; R. 3031).

container company specializing in that product (GX 788, 909; R. 2864, 3051). As a result of its three mergers in 1956, Continental's assets rose from $382 million to more than $633 million (GX 1212; R. 3317), and its net sales and operating revenues rose from $666 million to more than $1 billion (GX 1212; R. 3319). Measured by sales, it moved from the 47th (in 1955) to the 31st largest United States industrial corporation in 1956.[9]

(b) Hazel-Atlas, a West Virginia Company organized prior to 1900, was incorporated in 1901 as the Atlas Glass and Metal Company, and later merged with the Hazel Glass Company (*United States* v *Hartford-Empire Co.*, 46 F. Supp. 541, 547). It was one of the leaders in the mechanization of the glass container industry which was, at first, largely hand-operated. The development in 1903 of the automatic "suction" machine by the Owens Bottle Machine Company revolutionized the glass container industry, and Hazel-Atlas was granted an exclusive license to manufacture wide-mouth food jars by means of the Owens machine (R. 335–336). Thereafter, Hazel-Atlas entered into further licensing agreements under which it operated as the price leader for wide-mouth containers.[10] At the time of the *Hartford-Empire* case, Hazel-Atlas

[9] See *Fortune*, "Directory of the 500 Largest U.S. Industrial Corporations" (July 1956, July 1957).

[10] See *United States* v. *Hartford-Empire Co.*, 46 F. Supp. 541 (N.D. Ohio), affirmed in part and reversed in part, 323 U.S. 386. Glass containers are generally classified into narrow-neck (*e.g.*, for beverages and catsup) and wide-mouth containers (*e.g.*, for fruits and peanut butter) (R. 79). The latter are used predominantly for packing foods (R. 335).

was the second largest manufacturer of glass containers generally, and the largest maker of wide-mouth ware (46 F. Supp. at 613).

Prior to the merger with Continental, Hazel-Atlas, with net sales of more than $79 million, shipped approximately 9.6 percent of the glass containers in the continental United States, and was exceeded only by Owens-Illinois Glass Company (34.2 percent) and Anchor-Hocking Glass Company (11.6 percent) (GX 801, 1209; R. 2956, 3217). The remaining 44.6 percent of the market was divided among at least 39 other firms (R. 1593). Hazel-Atlas then had assets of $37 million, including 13 plants (GX 1210; R. 8, 11, 1584 3222, 3249–3250). It had always operated as a profitable venture and had not missed a dividend since 1907 (R. 337).[11]

2. THE DECISION OF THE DISTRICT COURT

In its opinion of April 15, 1963, the district court identified three classes of products produced by Continental and Hazel-Atlas which it considered to be relevant to a consideration of the legality of this merger (metal, glass and plastic containers),[12] and characterized each as being produced by a separate

[11] Prior to its acquisition in 1955, Hazel-Atlas had ranked as 347th of the 500 largest industrial corporations by sales, with sales of $79,174,000, and a net profit of more than $3 million. *Fortune*, "Directory of the 500 Largest Industrial Corporations for 1955," July 1956.

[12] For the purpose of this appeal, we accept the district court's rulings that closures (devices used to close and seal various containers) are not a relevant separate line of commerce (R. 1627), and that the relevant geographic market is the United States as a whole (R. 1600–1601).

industry (R. 1585, 1590-1597, 1603). The court found that "there was substantial and vigorous inter-industry competition between these three industries and between various of the products which they manufactured * * *. Each industry and each of the manufacturers within it were seeking to improve their products so that they would appeal to new customers or hold old ones. Hazel-Atlas and Continental were part of this overall industrial pattern, each in a recognized separate industry producing distinct products but engaged in inter-industry competition for the favor of various end users of their products" (R. 1603-1604).

The court ruled, however, that the existence of such "inter-industry or inter-product competition" did not mean "that the acquisition of Hazel-Atlas by Continental falls within the ambit of Section 7 of the Clayton Act" (R. 1604), and held that it was insufficient to make such "products from separate and distinct industries" constitute a line of commerce for the purposes of Section 7 (R. 1605). The court therefore held that this transaction could not be classified as a horizontal merger, since it was not between competing companies, and found it to be a "conglomerate" merger (R. 1606-1607) which "does not result in the elimination of a competitor but merely substitutes the competition of the acquiring company for that of the acquired company in the lines of commerce in which the acquired company was formerly engaged" (R. 1614).

Of the ten lines of commerce in which the government contended the merger would have anticompeti-

tive effects, the district court concluded that only three were supported by the evidence: the metal container industry (R. 1618–1622); the glass container industry (R. 1622–1627); and the production and sale of containers for beer (R. 1628–1633). In each of these, the court found inadequate evidence of probable anticompetitive effects resulting from this acquisition. The other proposed lines of commerce were rejected (R. 1633–1650). The court then held alternatively that "even assuming that any such product markets existed, * * * there was no proof of any reasonable probability of substantial anti-competitive effects or tendency to monoply as a result of the acquisition in any of them" (R. 1651).

SUMMARY OF ARGUMENT

I

This merger joins the second largest metal container manufacturer in the United States with the third largest glass container manufacturer. It combines dominant firms in two industries which have had a history of vigorous and unabated interindustry competition, and which have developed highly concentrated, oligopolistic, market structures. We submit that when a merger of such magnitude is involved, it is unnecessary for purposes of Section 7 of the Clayton Act for the government to demonstrate with precise statistical data exactly what share of the relevant product market will be affected by the merger, or what percentages had been held prior to the merger by either of the merging firms.

A. Section 7 protects interindustry competition as well as competition within an industry. This principle is particularly important in an age when modern technology and scientific advances have enabled manufacturers to cross traditional industry lines and compete in areas previously considered reserved to other industries. Competition between glass and metal container manufacturers has followed this pattern. Consequently, for "line of commerce" purposes, the present merger affects competition within the entire range of end uses for which metal and glass containers may now or hereafter be produced and sold.

B. The 1950 amendment to Section 7 was enacted principally to stem the tide of concentration in our modern economy. When, as is true here, a merger involves industries which are already highly concentrated, it is particularly suspect. And when the combining firms are each dominant in its own industry, the anticompetitive effect on interindustry rivalry is obvious. Accordingly, it should be sufficient for Section 7 purposes if the government proves: (1) substantial interindustry competition, (2) high concentration in either industry, and (3) the dominant positions of the merging firms. An interindustry merger on such a state of facts is sufficiently likely to have a substantial effect on present and potential competition between the industries to render it unlawful under Section 7. This "test of illegality" is, we submit, a more realistic measure of the consequences of such an interindustry merger than the selection and analysis of some relatively insignificant submarket in

which market shares can be demonstrated with accessible data.

C. The record in this case requires an affirmative finding on each of the three elements proposed above. Hence the government satisfied its burden of proof at the trial, and the district court erred in dismissing the complaint at the close of the government's case.

II

If it is necessary to engage in a market share analysis with respect to a merger of this magnitude, we submit that the record reflects a reasonable probability that the merger will substantially lessen competition in the production and sale of containers for "food canning"—*i.e.*, the process of hermetically sealing and heat-sterilizing food.

A. "Food canning" containers are a relevant product line for Section 7 purposes. Only metal and glass containers compete in this field, and they compete most vigorously. The record reflects substantial interindustry competition which is ultimately manifested in the choice available to consumers in retail grocery establishments. Many foods are "canned" in both metal and glass containers, and the merging firms in fact engaged in substantial competition *inter sese* for this market prior to their merger. In addition, the flexibility of manufacture enables most glass or metal container producers to manufacture containers for food "canning".

B. No precise authoritative statistics are available to determine market shares in this particular product market. However, the record contains figures, com-

724-601—64——3

piled from Bureau of Census data, showing market shares of the total metal and glass containers shipped in the United States and of those used for food of all kinds—whether or not hermetically sealed and heat-sterilized. In the absence of evidence to the contrary, these statistics may be assumed to provide a fairly accurate picture of the shares of the various leading firms in each significant component of the total food container market, including food "canning." On the basis of these figures, it is clear that the merger results not only in a significant increase in Continental's market share but also strengthens the undue concentration of power held by the three dominant firms in the relevant market. Therefore, under the standards announced by this Court in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, and *United States* v. *Philadelphia National Bank*, 374 U.S. 321, this merger violated Section 7 of the Clayton Act.

ARGUMENT

I

THIS MERGER VIOLATED SECTION 7 OF THE CLAYTON ACT BECAUSE ITS PROBABLE EFFECT WAS SUBSTANTIALLY TO LESSEN COMPETITION IN THE PRODUCTION AND SALE OF CONTAINERS FOR ALL END USES FOR WHICH METAL AND GLASS CONTAINERS COMPETE

A. SECTION 7 APPLIES TO MERGERS WHICH WOULD SUBSTANTIALLY LESSEN INTERINDUSTRY COMPETITION

The terms of Section 7 of the Clayton Act bring within its prohibitory scope any merger which may substantially lessen competition "in any line of commerce in any section of the country." As this Court observed in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320–321, this language was chosen by Congress to

leave to the flexibility of the decisional process the test for measuring the relevant product and geographic markets. Under the statutory formula it is the duty of courts "to recognize competition where, in fact, competition exists," *id.* at 326, and to draw the market lines accordingly. In each instance the touchstone is "the area of effective competition" (*Standard Oil Co. v. United States*, 337 U.S. 293, 299 n. 5, quoted in *United States v. E. I. Dupont de Nemours & Co.*, 353 U.S. 586, 593)—a standard which is applied not by segregating industries but by "discovering patterns of trade which are followed in practice." *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 303 (D. Mass.), affirmed, 347 U.S. 521.

When, as in the present case, "patterns of trade" demonstrate vigorous competition between members of two separate industries for the business provided by a large number of consumers (pp. 25-33, *infra*), any elimination or substantial lessening of such competition must come within the reach of Section 7 if the legislative objective of the statute is to be accomplished. The words "any line of commerce" cannot, consistently with the policy underlying Section 7, be construed as words of limitation which render the statute applicable only to mergers having a substantial anticompetitive effect within one industry. Such an interpretation of the statute would cripple its application in all cases involving interindustry mergers and would place beyond the reach of Section 7 combinations which endanger the vitality of competi-

tion among separate industries—an increasingly important and pervasive element in our modern economy.

Business[13] and academic[14] observers have recently had occasion to emphasize technological strides which have enabled firms to enter fields traditionally regarded as the province of another industry, a practice which promotes competition by broadening the consumers' latitude of choice. The president of du Pont, for example, recently described how a new resin was being used to make pipe and other items previously reserved to steel, aluminum or other metals. (See note 13, *supra*). An enlightening earlier example is provided in the work by David Lilienthal which was cited in support of the concept of interindustry competition in *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 393 (the *Cellophane* case). The author there related how, in the mid-1930's, the Tennessee Valley Authority had been able to turn to the aluminum industry and obtain aluminum conductor

[13] *E.g.*, Lilienthal, *Big Business: A New Era* (1952), pp. 58–67; Greenewalt, *A Businessman Looks at the Antitrust Laws*, 23 A.B.A. Antitrust Section 337; *Wall Street Journal*, editorials February 11, 1964, p. 18, December 26, 1963, p. 4. These business comments were made in part to urge the inaptness of applying the monopoly tests of the Sherman Act within separate industries. Regardless of the correctness of this argument, see pp. 36–38, *infra*, the vigor and scope of modern interindustry competition is highly relevant to appraising the validity of interindustry mergers.

[14] *E.g.*, Clark, *Towards a Concept of Workable Competition*, 30 Am. Econ. Rev. 241; Hale & Hale, *Market Power: Size and Shape under the Sherman Act* (1958), pp. 105–113; Robertson, *On the Changing Apparatus of Competition*, 44 Am. Econ. Rev. 51.

cable for overhead transmission lines at a time when all the copper companies had uniformly offered identical and excessive bids.[15]

These illustrations represent the trend whereby modern research and technological advances have prompted the crossing of the "orthodox industrial boundaries"[16] separating industries which had long settled into oligopolistic structure and patterns of behavior. Conventional industry or commodity categories are of little value in ascertaining the vigor of competition in such situations.[17] Nor is the usual statistical analysis of market shares within an industry useful in measuring the precise ranking of large interindustry competitors.

As this Court observed in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 317, the legislative history of the 1950 amendments to Section 7 clearly demonstrates that Congress intended to prohibit "not only * * * mergers between actual competitors, but also * * * vertical and conglomerate mergers whose effect may tend to lessen competition in any line of commerce in any section of the country."

We contend that this is such a merger and that the

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[15] Lilienthal, *Big Business; A New Era* (1952), pp. 58–60. Since the incident described by Mr. Lilienthal, aluminum conductor cable has substantially taken over the field of electrical cable for overhead transmission lines, a development described in the government's brief in *United States* v. *Aluminum Company of America et al.*, No. 204, this Term.

[16] Greenewalt, *A Businessman Looks at the Antitrust Laws*, 23 A.B.A. Antitrust Sec. 337, 339.

[17] Hale & Hale, note 14, *supra*, at p. 112.

district court erred in concluding that this is merely a "conglomerate" merger which "does not result in the elimination of a competitor but merely substitutes the competition of the acquiring company for that of the acquired company" (R. 1606-1607, 1614). In fact, the district court's own findings as well as other evidence in the record (pp. 25–33, *infra*) demonstrate that there was substantial actual and potential competition between the acquired firm and the acquiring firm. If a line of commerce embraces more than one industry, the substantiality of the resulting competitive effects may be more difficult to measure statistically but they are nonetheless significant. And the appropriate "line of commerce" in such an instance is the broad over-all market comprising all end uses common to the products of the merging companies. In the present case, therefore, the "line of commerce" within which the merger's effect on competition should be appraised is the production and sale of containers used for all purposes for which metal or glass containers may be used—*i.e.*, beer, soft drinks, food canning, toiletries and cosmetics, medicines, and other household or chemical goods.[18]

[18] This overall line of commerce includes competition for the same end uses by other containers, such as paper, plastic and foil. The further competition of such other industries prevents expression in market share percentages of the impact of this merger. In our view, as shall be shown below, the great volume of metal and glass container competition enables the government to meet its burden of proving substantial anticompetitive impact by evidence relating to the metal and glass container industries alone.

B. THE MERGER OF DOMINANT FIRMS IN COMPETING INDUSTRIES EACH OF WHICH IS HIGHLY CONCENTRATED VIOLATES SECTION 7

Any appraisal of the validity of an interindustry merger such as this one must begin with what this Court has determined to be "the dominant theme pervading congressional consideration of the 1950 amendments" to Section 7—*i.e.*, "a fear of what was considered to be a rising tide of economic concentration in the American economy." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 362–363; *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 315. The legislative judgment "at the core of Section 7," the Federal Trade Commission recently observed, is that there is a "relationship between concentration (and related market-structure characteristics) and lessened competition." *In re Procter & Gamble Co.*, F.T.C. Docket No. 6901, p. 23 (November 26, 1963).

In industries which are fully competitive and where the degree of concentration is low, competition may be adequately preserved by the prevention of combinations within the single industry. But when, as is true of the metal and glass container industries, the competitive pattern discloses that each competing industry is dominated by a handful of firms, the primary purpose behind Section 7 requires recognition of the dangerous consequences which may flow from a merger between two firms which are dominant in the separate but competing industries.

In many concentrated industries, indeed, interindustry competition presents a real and pressing challenge to oligopolistic structure, and it is deserving of

Clayton Act protection as much as the possibility of "eventual deconcentration" by the growth of small firms within the industry to rival the few present-day leaders. High concentration not only makes collusive anticompetitive behavior more feasible, but also is likely to result in a tacit accommodation between the firms, less price competition, abandonment of other forms of rivalry and willingness to accept the leadership of the dominant firms and otherwise to conform to their competitive norms. *In re Procter & Gamble Co.*, F.T.C. Docket No. 6901, pp. 24–27 (November 26, 1963). The appearance of a substantial interindustry competitor on this scene introduces a new firm, with resources and staying power probably unavailable inside the industry, and without the history of mutual accommodation that may characterize those presently in the industry. Acquisition of such a firm by one of the industry leaders may be motivated by the latter's desire to protect itself against competition of substitute products,[19] and would have precisely such an

[19] Hale & Hale, *Market Power: Size and Shape under the Sherman Act* (1958), p. 257. A monopolist's entry into substitute products may enhance its monopoly power and forestall the development and introduction of competitive substitutes. Hale & Hale, *supra*, at 282–284; Burns, *The Decline of Competition* (1936), pp. 454–456. Absent monopoly power, interindustry expansion by internal growth may increase competition. Hale & Hale, *supra*, p. 265. Such a result does not follow from expansion by merger, whose immediate consequence is the elimination of an independent factor. This Court has pointed out that Section 7 of the Clayton Act favors growth by internal expansion and disfavors growth by mergers. *United States* v. *Philadelphia National Bank*, 374 U.S. at 370; *Brown Shoe Co.* v. *United States*, 370 U.S. at 345, fn. 72.

insulating effect. Consequently, it is of concern to the antitrust laws, because such mergers may well help to preserve and extend the unsatisfactory market structure of the concentrated industry.[20]

The importance of interindustry competition as an agency of deconcentration provides, we believe, the basis for testing mergers of the scope here involved. A merger's elimination of substantial interindustry competition can be a significant step towards increasing concentration by maintaining and extending the existing oligopoly structure. Like a merger creating undue market shares within an industry, an interindustry merger bringing together large firms, each being one of the few leaders in highly concentrated industries which are competing with one another on a broad scale, is one "whose size makes [it] inherently suspect in the light of Congress' design in § 7 to prevent undue concentration." *United States* v. *Philadelphia National Bank,* 374 U.S. at 363. As in *Philadelphia Bank,* it is appropriate and possible in this situation "to simplify the test of illegality." 374 U.S.

[20] The proposition that when an industry structure is unsatisfactory from the point of view of competition, interindustry competition is particularly to be prized, is supported by the analogy of the Congressional policy in regulated industries. Recognizing that limitation upon entry and other controls lessen the effectiveness of competition within each industry, Congress has taken pains to assure the effective competition of related industries by restricting the possibility of interindustry acquisitions. See Edwards, *Maintaining Competition: Requisites of a Governmental Policy* (1949), pp. 266–267. E.g., Interstate Commerce Act, Sec. 5, 49 U.S.C. 5; Federal Communications Act, Sec. 314, 47 U.S.C. 314; *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83.

724-601—64——4

at 362. We submit that in such a case the government can satisfy its burden of showing that the merger may have the effect of substantially lessening competition by proving (a) the existence of substantial competition between two industries; (b) a high degree of concentration in either or both of the competing industries; and (c) the dominant positions of each of the merging companies in its respective industry.

This "test of illegality" omits analysis of statistics regarding market shares simply because those traditional yardsticks are generally unavailable to measure the full consequences which an interindustry merger would have on competition. The district court correctly analogized competition between glass and metal containers to other types of interindustry competition, such as that between copper and aluminum products; cotton, wool and synthetic fibers; and iron, copper and plastic pipe (R. 1604–1605, fn. 38). In each of those instances, companies from separate industries may compete through a great number of products for the business of an equally large range of customers, with varying competition from firms in other industries.[21] It may be possible to measure some portion of the anticompetitive effect of an interindustry merger in any of those areas by isolating a submarket in which market percentages are ascertainable because the participation of other industries is negligible or readily determinable. Although proof of a substantial lessening of competition in

[21] See Robertson, *On the Changing Apparatus of Competition*, 44 Am. Econ. Rev. 51, 54–57.

any such submarket would invalidate the merger under Section 7, it is obvious that this analysis would not fully reflect the over-all effect of the merger on competition.

Statistical demonstrations would be unsatisfactory with respect to such mergers for several reasons. First, the common product lines of the merging companies usually enjoy varying degrees of competition from other industries, and the volume of this competition is not subject to precise computation. Second, the particular merging firms may not presently compete *inter sese* in all the particular submarkets which would probably be affected by their merger. Since the merger forecloses the potential interindustry competitor's entry into submarkets in which the acquiring firm is active, its anticompetitive impact cannot be evaluated simply by adding present market shares.[22] Third, the larger the merging firms are the more likely is it that they produce a diversity of products,

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[22] The district court found, for example, that Hazel-Atlas was not presently a significant manufacturer of beer bottles and therefore rejected the contention that the merger would substantially lessen competition in the beer container line of commerce (R. 1630–1633). Although we do not contend here that the mere possibility that Hazel-Atlas might produce beer bottles was sufficient to affect competition in that "line of commerce," we do believe that the *total* of Hazel-Atlas' competitive potential in the particular submarkets served by Continental, particularly in light of the vigorous interindustry competition for new uses for glass and metal containers, the flexibility of production within the industry, the interchangeability of uses to which the same container may be put, and technological advances, requires recognition of Hazel-Atlas' status as a potential competitor in various submarkets now served principally by Continental and by other glass container companies.

with a multiplicity of end uses. It would be most unrealistic to appraise the impact of a merger between the country's largest industrial companies (*e.g.*, the leading steel and aluminum producers) by focusing only on one or several specific product lines and attaching conclusive effect to the percentage totals in such lines (*e.g.*, aluminum and steel kitchenware). The execution of the legislative judgment incorporated in Section 7 requires a more pragmatic appraisal of the anticompetitive consequences of such a merger than is provided by the ordinary statistical market analysis. It is our position that the three-pronged test of illegality suggested above is a more satisfactory and simpler method for determining whether an interindustry merger may substantially lessen competition in any line of commerce[23] than an examination of market percentages. We submit that an interindustry merger which meets these standards, no less than an intraindustry one which satisfies conventional market share percentage requirements, does "raise an inference that the effect * * * may be substantially to lessen competition." *United States* v. *Philadelphia National Bank*, 374 U.S. at 365. Whether this showing may be rebutted by other evidence, and what evidence would be pertinent, is not now in issue because the complaint was dismissed at the conclusion of the government's case.

[23] Since competition here is nationwide, there is no issue in this case as to the appropriate "section of the country." The test suggested above assumes, of course, that the industries compete in the same "section of the country" and that the merging firms are at least capable of competing in the same geographical area.

C. THE MERGER OF CONTINENTAL AND HAZEL-ATLAS SATISFIES THIS TEST AND THEREFORE VIOLATES SECTION 7

The record in this case supports the conclusion that the merger between Continental and Hazel-Atlas violated Section 7 because it was a combination of two dominant firms in competing and highly concentrated industries.

(1) Interindustry competition

The district court effectively described the competition involved in the present case, as follows (R. 1603–1604):[24]

> Concededly there was substantial and vigorous interindustry competition between these three industries and between various of the products which they manufactured. Metal can, glass container and plastic container manufacturers were each seeking to enlarge their

[24] For the purposes of this appeal, we are focusing upon competition between metal and glass containers. There can be no doubt, as the district court found, that plastic containers are, to some extent, also competitive with metal and glass containers; competition is also provided by paper, foil and other products, as we have noted (fn. 18, *supra*, p. 18). With respect to the industry specifically cited below, plastic containers, the total volume of commerce was, at the time of this merger, small compared to the overall interindustry competition between metal and glass containers. The court below noted that total sales of plastic containers in 1959 were only about $30 or $40 million; Continental's sales of such items in 1955 amounted only to $2.4 million (R. 1595). Obviously this comparatively small amount of commerce could have little impact on the vast competition between the $1 billion, 380 million sales of metal containers and approximately $830 million in glass containers (GX 800, 900; R. 1584, 2867, 3058). We believe that the government has met its burden of showing a violation of Section 7 relying upon Continental's production of metal containers, without regard to its sale in plastics, paper and other container materials.

sales to the thousands of packers of hundreds of varieties of food, chemical, toiletry and industrial products, ranging from ripe olives to fruit juices to tuna fish to smoked tongue; from maple syrup to pet food to coffee; from embalming fluid to floor wax to nail polish to aspirin to veterinary supplies, to take examples at random.

Each industry and each of the manufacturers within it was seeking to improve their products so that they would appeal to new customers or hold old ones. Hazel-Atlas and Continental were part of this overall industrial pattern, each in a recognized separate industry producing distinct products but engaged in interindustry competition for the favor of various end users of their products.

These findings were fully supported by evidence in the record and by undisputed conclusions reached by commentators who have considered these industries. As reflected in the literature on the metal and glass container industries, the two containers are functionally interchangeable and present alternatives to packers, whose competitive choice between them has varied with the commodity to be packed, their comparative cost, and other characteristics which affect the desirability of each.[25] Metal cans may be handled and stored easily,

[25] R. 1642; Hession, *The Metal Container Industry* in Adams ed., *The Structure of American Industry* (3d ed. 1961), pp. 458–460; McKie, *Tin Cans and Tin Plate* (1959), pp. 136–141, 295–296; Whitney, *Antitrust Policies; American Experience in Twenty Industries* (1958), Vol. II, pp. 222–223; Hession, *Competition in the Metal Food Container Industry 1916–1946* (1948), pp. 296–310; "Business at War; Glass v. Tin," *Fortune*, June 1945, p. 187; "American Can Co.," *Fortune*, January 1941, p. 53; "Billions of Bottles," *Fortune*, April 1932, p. 70.

and they have generally been cheaper than any glass containers other than reusable bottles. Glass containers offer the advantages of transparency and of consumer preference based on belief as to cleanliness, effect on taste and ease of storage of contents after opening. Use of glass containers increased substantially during the Second World War because of government controls on tin plate. Since then there has been intense rivalry for markets which has produced technological advances and other competitive responses. "Competition which in the past had been merely potential became active and aggressive." [26]

This interindustry rivalry also is a factor in pricing, as is illustrated by the testimony of the chairman of the board of Owens-Illinois Glass Co. that he takes into account the price of metal containers in pricing glass containers for beer, soft drinks, household and chemical products, and to a lesser degree for toiletries and cosmetics (GX 348–348h; R. 98, 2441–2457). Conversely, the president of U.S. Steel, in the TNEC hearings, stated that in arriving at prices for tin plate "other types of containers * * * always comes into our discussions." [27] And Continental's own concern with comparative prices is illustrated by its dissemination to sales personnel of price information on glass containers for beer (GX 438–439; R. 2705–2709) and by other internal memoranda (GX 434, 441, 588, 781; R. 2693–2699, 2727–2733, 2754–2757, 2825–2828).

[26] See Hession in Adams ed., note 7, *supra*, at pp. 458–460; "Business at War," *Fortune*, June 1945, p. 187.

[27] Hearings of the Temporary National Economic Committee, Investigation of Concentration of Economic Power, 76th Cong., 2d Sess., p. 10792 (1939).

In the district court, the government produced the most graphic evidence of the interchangeability of glass and metal containers—the fact that numerous products are packed in both types of containers. Investigators observed a great variety of goods being offered for sale competitively at retail stores throughout the country in both glass and metal containers. This was true in the food canning industry (pp. ~~51–56~~, 41–46 *infra*), and in other end uses. Government investigators noted many items in toiletries and cosmetics, in medicinal and health products, and in household and chemical products, including in these categories such disparate articles as shaving cream, aspirin, and silver polish, being sold in both metal and glass containers (GX 949, 1158, 1160–1177, 1178A, 1178B, 1179–1201; R. 3069–3179).

The fact that at any given time some particular products may be packed preponderantly in one of these containers, to the almost total exclusion of the other, is of minimal significance. Consideration of only this static data (DX–N; R. 3389–3392) overlooks the dynamic nature of the competition between these two industries. Each exerts continuous pressure on its present and potential customers not only to increase its percentage share of products already packed in a particular type of container, but also to open up new commodities to the use of that type of container and to persuade the packers of these commodities to switch to such a container. The district court recognized, in considering the merger's effect on the beer container line of commerce, that Hazel-Atlas could, "at relatively little expense," convert its machinery to the production of a variety of glass

containers other than those being manufactured at the time of the merger (R. 1632). Such flexibility would enable glass container manufacturers to supply containers for a wide range of purposes since the same raw materials are used, the same production processes are followed, and the same channels of distribution are employed irrespective of the ultimate shape or function of the glass container (R. 1588). The same is true of metal containers (R. 1587).

The fact that metal and glass containers are not identical in price or in all quality characteristics merely illustrates the choice provided for packers so long as the two industries are in active competition. This choice may be guided by a packer's estimate of the relative desirability of each of these containers, and the advantages of each are fully exploited and emphasized only when the two industries compete. Beer, for example, is packed extensively in metal and glass containers, and the development of the beer can, which in turn prompted the production of cheaper and lighter weight non-returnable bottles,[28] illustrates the effect of interindustry competition on technological development. The record also shows how container manufacturers appraised the elements of relative cost, convenience and consumer preference in attempting to persuade brewers to utilize either glass or metal containers (GX 31, 114–116, 124, 127, 130, 434–436, 438, 440 440A, 445, 446, 448, 543, 588, 589; R. 1667, 2132–2139,

[28] McKie, note 25, *supra*, pp. 139–140; Hession, *Competition in the Metal Food Container Industry 1916–1946* (1948), pp. 299–304.

2196–2197, 2204–2207, 2221–2222, 2693–2705, 2709–2727, 2738–2760).[29]

This competitive pressure is illustrated in the record by Continental's own efforts to break into a field largely dominated by glass containers at the time of this trial—the bottling of soft drinks. Continental not only offered these packers the familiar flat-top style metal container for soft drinks but, after years of development and research, produced a specially designed cap-sealed container. It energetically extolled the virtues of utilizing metal containers by making favorable comparisons of the costs of shipping the two containers, their relative speed of filling, and the investment required to convert a packing line from glass to metal containers (GX 600, 642; R. 2761–2779, 2804–2807). Continental carefully watched the introduction of soft drinks in metal containers in a limited area by one packer, and estimated the total potential market in carbonated beverages as about 23 to 25 billion bottles per year. Although Continental was not certain to what extent it could penetrate "this tremendous market", it estimated the potential for metal containers as between 700 million

[29] While Hazel-Atlas had not become a significant factor in the production and sale of beer bottles at the time of merger, its shipments of such containers had increased to about 17,136,000 in 1957 (GX 800–801; R. 2875, 2876, 2959), and internal memoranda evidence its interest in this field (GX 777–779; unprinted). More important, Continental regarded its acquisition of Hazel-Atlas as one step towards developing "a complete line of glass jars and bottles including beverage bottles" the full consummation of which contemplated a further acquisition of a company already in the beverage bottle business (GX 900; R. 3051).

and 1,250 million, on "a conservative basis" (GX 600B; R. 2781–2785).

It also studied market surveys taken to test consumer acceptance of soft drinks in metal containers (GX 601; R. 2785–2788), considered the attitude of grocery chains toward this method of packaging (GX 612; R. 2789–2790), planned new improvements in its container designed to overcome past objections to the ability of metal containers to withstand the internal pressures generated by soft drinks (GX 613, 684; R. 2790–2796, 2818–2819), and conducted an extensive comparison of the economics of soft drinks packed in metal and glass containers (GX 617; R. 2797–2801).

That this was active, aggressive competition is confirmed by the response of the still-dominant purveyors of glass containers. Owens-Illinois took the price of metal containers into account when pricing its glass containers for the soft-drink industry (R. 98), expressed concern with the active competition in soft drinks being provided by metal containers (GX 235c; R. 2293), and urged active solicitation of bottlers to keep the competing containers as much out of the field of soft drinks as possible (GX 235d; R. 2299). The Glass Containers Manufacturers' Institute carried on extensive market research and promotion to aid its members in continuing their dominance of the bottlers' business,[30] conducted surveys of consumer attitudes concerning the competing containers,[31] and clearly

[30] GX 47–51, 62–71, 73, 85–113, 118–123; R. 321–322, 957–958, 1881–1890, 1915–1941, 1944–1946, 2049–2130, 2141–2196. In turn, United States Steel Company placed advertisements in periodicals of the bottling industry which extolled the virtues of soft drinks in metal containers (GX 170B–177; R. 2255–2267).

[31] GX 80–82, 84; R. 1970, 1978, 1979, 1982, 2008, 2009, 2011, 2012, 2016–2018, 2023, 2042–2047.

recognized "the seriousness of the competition from soft drink cans" (GX 85; R. 2051).

Similar efforts were made with respect to the packaging of instant coffee—a food product which was being packed almost exclusively in glass containers (DX N; R. 3390). Detailed studies and advertising campaigns were conducted by Continental in an attempt to capture for the metal container industry some portion of this substantial market (GX 404, 405, 405A, 406, 407, 408, 409, 411, 412, 413; R. 2553–2613). Active competition existed with respect to detergents (R. 107–134, 365; GX 429; R. 2671–2693) and pharmaceuticals (GX 695, 422, 702–703; unprinted; R. 355, 364). And Owens-Illinois conducted studies comparing the cost of metal and glass containers for detergents and polish (GX 348 h; R. 2457–2458), of metal, glass and plastic containers for liquid detergents (GX 349 A, 349B; R. 2461–2468), and of metal and glass aerosol containers (GX 348 h; R. 2457). The Glass Container Manufacturers' Institute also carried on an extensive program of market research and promotion to foster the use of glass containers for toiletries and cosmetics, chemical and household products, and medicinal and health items (GX 33, R. 1691, 1703–1707, 1715, 1717, 1761).

In summary, it has been fully demonstrated in the record that one of the characteristics of the metal and glass container industries is that of constant rivalry whereby packers are, by reason of technological advances and other efforts of each industry, continuously offered the opportunity to transfer their products from one type of container to the other. An inter-

industry merger in this context clearly terminates such flexible competition between the merging firms and not only forecloses competition insofar as the two companies are presently rivals in any submarket but also shuts off all initiative to expand into one another's realm.

(2) *Concentration*

The extremely high concentration of the metal and glass container industries cannot be gainsaid. The metal container industry is recognized as a "duopoly," with two companies—American Can Company and appellee Continental—leading and dominating this vast field.[32] In terms of the volume of cans, American Can Company, before the merger, accounted for about 40 percent of industry shipments, and Continental accounted for about 32.6 percent (GX 801; R. 2962). Thus, these two companies alone represented about 72.6 percent of the market; below these the market shares fell off precipitously to about 5 percent for National Can Company (GX 801; R. 2962). The remaining 23 percent of the market was divided among 75 to 90 relatively small firms (R. 1590).

The glass container industry presents a similar—though less extreme—picture of concentration, led by three large companies holding about 55.4 percent of the market. These are Owens-Illinois Company, accounting for about 34.2 percent of all shipments of glass containers, Anchor-Hocking Glass Company,

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[32] See McKie, *Tin Cans and Tin Plate* (1959), pp. 83-92, Whitney, *Antitrust Policies: American Experience in Twenty Industries* (1958), Vol. II, p. 201; Hession, *Competition in the Metal Food Container Industry 1916-1946* (1948), ch. 3.

with 11.6 percent, and Hazel-Atlas with about 9.6 percent (GX 801; R. 2956). The remaining 44.6 percent were split among some 39 other companies (R. 1593).

Furthermore, the metal and glass container industries were among those specifically and repeatedly referred to in Congress during the passage of amended Section 7. These industries thus demonstrated the dangerously high level of concentration already reached in many areas of the country's economy and the necessity of preventing further concentration and the consequent adverse impact upon competition.[33]

(3) Dominance

The size and importance of the two merging companies are outstanding. Continental's 32.6 percent of the industry shipments represents 13 billion metal containers out of the nation's aggregate shipments of 39¾ billion containers in 1955 (GX 801, R. 2962). In terms of dollar volume, Continental's sales of metal containers that year were $433 million, or 31.4 percent of the industry's gross sales of $1,380,000,000 (GX 900, R. 3057-3058). Continental, like American Can, has the competitive advantage of having its metal container plants located throughout the country (R. 413-415; fn. 32, *supra*).

The over-all size of Continental is also of considerable significance in appraising its significance as a

[33] Hearings before Subcommittee of the Senate Judiciary Committee on H.R. 2734, 81st Cong., 1st and 2d Sess., pp. 5-6, 17, 28; 95 Cong. Rec. 11502; A6120; 96 Cong. Rec. 16436, A570; Hearings before Subcommittee No. 2 of House Judiciary Committee on H.R. 515, 80th Cong., 1st Sess., pp. 305, 314; Federal Trade Commission, Report, The Concentration of Productive Facilities, 1947, pp. 32-33, 80-82; Report on The Merger Movement, A Summary Report, pp. 35-36.

competitive force. Prior to the merger, Continental had assets of $382 million including 72 domestic plants, and annual gross revenues of $666 million. The acquisition of Hazel-Atlas was part of its program to develop a complete line of container and packaging products (GX 900, R. 3049–3052) and it clearly had the resources to attain this objective, either by internal expansion or acquisition.

Hazel-Atlas' 10 percent of glass container shipments amounted to one billion 857 million containers of the 19⅓ billion glass containers shipped in the continental United States in 1955 (GX 801; R. 2956). Before the merger, it had annual sales of more than $79 million and assets of more than $37 million, including 13 plants (GX 1210; R. 8, 11, 3222, 3249–3250). For two generations, it has maintained its position as an industry leader. It was an early pioneer in container manufacturing machinery and, more recently, it developed the glass container for baby food which has replaced the metal can in most of this market (R. 338–339). Up to the time of the merger, Hazel-Atlas had an uninterrupted profit record (R. 337).

That this merger is the sort contemplated by the terms of Section 7 appears from reports of the Federal Trade Commission as well as from studies made by others who have analyzed the industries. In the Federal Trade Commission's studies of industry concentration which are part of the legislative history of Section 7, Continental's acquisitions of companies in related container fields were cited as examples of "substitute product acquisitions," and these

were assertedly a common class of horizontal merger which represented the present-day threat of industrial concentration by merger. Federal Trade Commission, *The Merger Movement: A Summary Report*, pp. 35–36. See also Federal Trade Commission, *The Present Trend of Corporate Mergers and Acquisitions*, S. Doc. No. 17, 80th Cong., 1st Sess., p. 12. And commentators have pointed explicitly to the dangers to competition from mergers between producers of metal and glass containers. The "quiescent state" of price competition within the metal container industry has been thought sufficient to warrant the prevention of any merger which would reduce interindustry competition.[34] In adidtion, a warning has been issued against the long-run possibility of a series of mergers combining metal and glass container manufacturers, which would have serious anticompetitive consequences and which should be prevented in their incipiency.[35] Approval of the Continental-Hazel-Atlas merger might require approval of similar transactions by rival firms (*Brown Shoe Co.* v. *United States*, 370 U.S. at 343–344), and the result would be the extension of one oligopolistic pattern of structure and behavior over both industries.

We submit that there is ample evidence in the record to warrant a finding that the merger amounted to a violation of Section 7. The district court's contrary conclusion was apparently the result of its misapplication here of this Court's criteria for de-

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[34] Hession, *Competition in the Metal Food Container Industry, 1916–1946* (1948), p. 331.

[35] McKie, *Tin Cans and Tin Plate* (1959), pp. 295–296.

termining the existence of monopoly power violative of the Sherman Act, as set out in *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377. The court (R. 1604) relied upon the passage in *du Pont* which stated (351 U.S. at 393):

> * * * one can think of building materials as in commodity competition but one can hardly say that brick competed with steel or wood or cement or stone in the meaning of Sherman Act litigation; the products are too different. This is the interindustry competition emphasized by some economists. See Lilienthal, Big Business, c. 5.

But this language must be read in its context, explaining that a monopoly position in a recognized industry such as steel would violate Section 2 of the Sherman Act, and would not be justified by the availability of brick.[36] As elucidated in the extensive literature prompted by the *du Pont* case, the problem under Section 2 is that all substitutes, however re-

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[36] Similarly, *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594 (1953), relied upon below (R. 1605), was concerned with whether a company had a "monopolistic" or "dominant" position in the market for one product, which the Court said was required to invalidate, under the Sherman Act, the tying of another product to it, and the question was the extent to which the sole morning newspaper's dominance was diluted by afternoon papers. In view of appellees' apparent contention that the district court did not disparage interindustry competition (Motion to Dismiss or Affirm, p. 8), it is instructive that the district court's misapplication of the *du Pont* case followed the reasoning urged on it by appellees' counsel, that in *du Pont* "the Supreme Court rejects interindustry competition as a criterion in the determination of the metes and bounds of the relevant market" (Tr. 3835, unprinted).

mote, do limit a monopolist's power somewhat, and that a line must be drawn excluding some substitutes if the concept of monopoly is to retain any meaning.[37] Neither this approach, nor the Court's opinion in *du Pont*, ignores the competition provided by substitutes or sanctions restraints upon it. Implicit in all the discussions of this case, indeed, is a recognition of the pervasiveness of interindustry competition.[38] When shifting to merger law, therefore, it is essential to recognize that, as one writer has pointed out, "both intraproduct and interproduct competition may be important and either may be substantially lessened." [39]

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[37] *E.g.*, Report of Attorney General's Committee to Study the Antitrust Laws (1955), p. 322; Dirlan & Stelzer, *The Cellophane Labyrinth*, 1 Antitr. Bull. 633; Hale & Hale, *Market Power: Size and Shape under the Sherman Act* (1958), pp. 105–113; Stocking, *Workable Competition and Antitrust Policy* (1961), pp. 274–277; Stocking & Mueller, *The Cellophane Case and the New Competition*, 45 Am. Econ. Rev. 29; Turner, *Antitrust Policy and the Cellophane Case*, 70 Harv. L. Rev. 281.

[38] The holding of *du Pont* itself refutes the view of the court below that physically dissimilar products cannot usually be in the same relevant market for antitrust purposes. For this Court rejected the government's contention that du Pont's 75 percent control over cellophane violated the Sherman Act, on the precise ground that the relevant market was "flexible packaging materials"—including such widely different products as aluminum foil, vegetable parchment and waxed paper, because competition from these products effectively limited du Pont's ability to control the price of cellophane. The Court stressed that "Illegal power must be appraised in terms of the competitive market for the product", a scrutiny in realistic terms, without limitation to "physically identical products" (351 U.S. at 393–394).

[39] Turner, *Antitrust Policy and Cellophane Case*, 70 Harv. L. Rev. 281, 315, fn. 80.

More appropriate than the dictum in *du Pont* upon which the district court relied was the actual holding in that case that the broader category of flexible packaging materials, rather than the narrower cellophane industry, was the relevant market for determining whether du Pont had violated Section 2 of the Sherman Act. The Court pointed out that "[i]ndustrial activities cannot be confined to trim categories" (351 U.S. at 395), and that "despite cellophane's advantages, it has to meet competition in every one of its uses" (351 U.S. at 399). Just as cellophane and Pliofilm were regarded in *du Pont* to be competing packaging materials for meat packers and other packaging customers (351 U.S. at 399-400), so are glass and metal containers in competition in this case for the business of all users of such containers. When, as here, the legality of an interindustry merger is at issue, it is particularly appropriate to consider the challenged conduct in light of this broader market.

II

THIS MERGER VIOLATED SECTION 7 OF THE CLAYTON ACT BECAUSE ITS PROBABLE EFFECT WAS SUBSTANTIALLY TO LESSEN COMPETITION IN THE PRODUCTION AND SALE OF CONTAINERS FOR THE FOOD CANNING INDUSTRY

Although we contend that apart from market share analysis this merger violated Section 7 because of the positions of the merging firms in competing and highly concentrated industries, we are prepared to demonstrate that the merger's anticompetitive effect on a single submarket—the production and sale of containers for the food canning industry—as disclosed by the record is sufficient to sustain the government's burden of proof. Among the end uses common to Continental's metal containers and Hazel-Atlas' glass containers, food canning was chosen by the government as one of the most significant in terms of substantiality of commerce and in terms of public and industry recognition. We submit that the manufacture and sale of containers for the food canning industry is an area of effective, realistic competition between Continental and Hazel-Atlas and an appropriate line of commerce for Section 7 purposes, and that the district court erred in reaching a contrary conclusion. With respect to this line of commerce the government met its burden of proving anticompetitive consequences, even if statistical proof be requisite, since its evidence demonstrated that the market share of the merged company together with the resulting increase in concentration rendered the merger "inherently likely to lessen competition substantially." *United States* v. *Philadelphia National Bank*, 374 U.S. at 363.

A. THE PRODUCTION AND SALE OF CONTAINERS FOR THE FOOD CANNING INDUSTRY IS A RELEVANT PRODUCT MARKET FOR SECTION 7 PURPOSES

"Food canning," as defined by the container industry, is the process of hermetically sealing and heat-sterilizing food (R. 698–699).[40] This process bears upon competition between metal and glass containers because, as was testified by qualified experts, only these two containers have the requisite physical properties for thus "canning" food.[41] The "literally thousands of packers purchasing containers for packing hundreds of food products," to which the district court referred (R. 1642), must choose between these two types of containers if they wish to take advantage of the protection against food spoilage and deterioration afforded by the canning process. In this field metal and glass containers are functionally interchangeable, and no containers other than these compete.

There can be no doubt that this proposed line of commerce is "substantial." *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 595. The National Canners Association estimated that the market annually comprised 22 billion metal and glass

[40] Heat-sterilizing is a protective measure applied after the food has been sealed in glass or metal hermetic containers. It consists, basically, of heating the filled containers under pressure to a temperature which is calculated to destroy all, or essentially all, of the bacteria present in the food which would have a tendency to spoil it, and then cooling under controlled conditions (GX 317, 318, R. 2337–2440). A hermetic seal, impermeable to air and other gases, is needed to keep the contents sterile.

[41] See, *e.g.*, R. 63, 71–75, 180, 204–305.

containers in which were packed about 8½ percent of the nation's food supply.[42] A line of commerce may, of course, be defined in terms of a substantial class of customers even though the same product is also used by others; the Court in *du Pont* defined a relevant market of finishes and fabrics in terms of users by drawing the product market "coextensive with the automobile industry." *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. at 593–595, and dissenting opinion at 650–654.[43] Manufacturers may sell the same container for food and nonfood uses (R. 1587, 1588), but from the point of view of the users—*i.e.*, the large well-defined industry of food canning—the elimination of any container manufacturer diminishes the choices available to them. We believe that it comports with "trade realities" (*United States* v. *Philadelphia National Bank*, 374 U.S. at 357) to measure the impact of this merger in the market defined by this category of end use.

As has been previously demonstrated, there is substantial competition between the glass and metal container industries for a multitude of end uses. This competition is no less intense with regard to food

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[42] GX 133, p. 3 (unprinted). The district court admitted into evidence these over-all figures for canning, with leave to the appellees to introduce their own statistics (R. 716). These figures are being used here not as proof of the precise quantity involved but merely to demonstrate that the market is a large one.

[43] See also *Crown Zellerbach Corp.* v. *Federal Trade Commission*, 296 F. 2d 800, 807, 813 (C.A. 9), certiorari denied, 370 U.S. 937; *Reynolds Metals Co.* v. *Federal Trade Commission*, 309 F. 2d 223, 228–229 (C.A. D.C.); *A. G. Spalding & Bros.* v. *Federal Trade Commission*, 301 F. 2d 585 (C.A. 3).

canning than it is elsewhere. Among the many products observed by government field investigators in retail stores for sale in both metal and glass containers were more than 100 food items, including applesauce, pears, peaches, peas, beans, tomato juice, sardines, peanut butter, and ranging even to caviar, papaya and tamales (GX 949, 1158, 1160–1177, 1178A, 1178B, 1179–1201; R. 3069–3179). Variations among these items as to quality and price merely demonstrate the competitive choice available to the food packers and ultimately to the consuming public. Manufacturers of glass containers stress the transparency of their product, its greater attractiveness, and its ease of storage and re-use (GX 669, 671; R. 957–958, 2814–2816). Metal container manufacturers, on the other hand, emphasize the facts that their products are cheaper to fill, easier and less expensive to ship, and less bulky (GX 675; R. 2817).

This competition is reflected in the activities of the respective trade associations. The records of the Glass Container Manufacturers' Institute (GCMI), of which Hazel-Atlas was a member, contain, for example, letters exchanged with glass container manufacturers complaining of the vigorous competition from firms making metal containers, specifically Continental.[44] The aspirations of glass container manu-

[44] *E.g.*, Letter from Director, Market Research and Promotion, GCMI, to president of a member firm: "Both of these letters from Continental [distributed in the St. Louis area] burn me up. The first one is really very vicious in its handling of breakage and glass chips and of course the second one is greatly exaggerated as to the savings that could be effected by purchasing baby food in cans." (GX 1, 3; R. 1657–1661).

facturers to increase their share of the food market is reflected in their concern with advertising, extensive customer surveys, and store audits conducted in cities throughout the country (GX 14, 47–56, R. 1661–1662, 1881–1905). These marketing devices studied the glass container manufacturers' share of the market for baby food (GX 42–46, R. 1867–1880), and for food generally, and attempted to measure customer motivation in choosing food in a particular container (GX 84, R. 2005–2047). The Can Manufacturers Institute (CMI), of which Continental was a member, conducted comparable activities on behalf of its members' interests in promoting the use of metal containers for food at the expense of glass containers (GX 145, 147, 148, 156, 158, 166; R. 2245–2253). An example of these activities, especially in relation to containers for food, is found in the Fifth Annual Consumer Survey on Containers, prepared for CMI by Benton & Bowles, Inc. The stated purposes of the survey, and its summary of results clearly demonstrate the broad scope of the competitive efforts of the metal container manufacturers (GX 138, R. 2229–2244).

In addition, food packers themselves recognize that metal and glass container manufacturers are competing for their business. They have not hesitated to warn Hazel-Atlas and other glass container manufacturers that if glass prices rose too high, their foods would be packed in metal containers (GX 775, 776, R. 2822–2824). In at least one instance, a food packer has succeeded in obtaining a reduced price for glass containers by such a threat (GX 773, R. 2821–2822).

The fact that at any particular time certain foods are "canned" predominantly in one or the other of these competing products (DX–N, R. 3389–3392) is not significant. The nature of the interindustry competition is such that it is never static, and the container manufacturers engage in constant competition to draw new products to their particular type of container. See pp. 25–33, *supra*. A cogent illustration is the history of baby food packaging:

Baby food, once packed entirely in metal cans,[45] was estimated to have been divided 80 to 20 percent in favor of glass containers at the time of trial (DX–N, R. 3389). Hazel-Atlas played a substantial part in this shift by designing the container which "has become the typical baby food jar" (R. 338). Containers for these products had been one of Hazel-Atlas' major lines as far back as 1922 or 1923, when it sold to all of the major producers of such food—Clapp, Beechnut Company, H. J. Heinz, and Libby, McNeill & Libby (R. 333–334).[46] In response to the contemporary dominance of glass containers in this field, Continental intensively endeavored to increase its share of this business. Comparative costs were carefully studied, although customer preference for glass

[45] McKie, *Tin Cans and Tin Plate* (1959), p. 138.

[46] Hazel-Atlas produced these containers with a Miller machine, which was the best available until the advent of the more efficient Hartford-Empire IS machine. Thereafter, after 1941 or 1942, Hazel Atlas' share of the baby food container business tapered off, due primarily to its lack of the more efficient machine (R. 339–341). However, Hazel-Atlas had plans to obtain more Hartford-Empire machines and had several on order prior to the merger (GX 363, 364, R. 2470–2518).

was noted (GX 400A, R. 2532, 2535); a list of packers of baby food was compiled, as well as a chart of the size of the baby population between the ages of 3 months and 2 years—both packers and babies being potential customers in this market (GX 415, unprinted); and advertising campaigns designed to overcome mothers' prejudices against metal containers were conducted (GX 415B, 415C, R. 2614–2627). Advertising agencies studied "the relative use of brands and the attitude of women toward the use of tin cans versus glass as containers for baby food" (GX 416, R. 2630, 2628–2632). Similar in-depth studies of consumer preferences were used as bases for considering redesign of the metal container then used for baby food and for measuring the results of previous advertising campaigns (GX 415B, 417, 419A–C, 420, R. 623, 2622, 2632–2649).

The record discloses many instances other than the packing of baby food in which Continental and Hazel-Atlas competed before their merger for the business provided by food canners. Hazel-Atlas was for years the industry leader in wide mouth ware, the containers predominantly used for food canning (R. 335). A former general sales manager and member of its board of directors described Hazel-Atlas as being "always food-minded" (R. 335, 357) and declared further that food containers had been the company's "main product" (R. 333). The list of foods which, according to the record, were packed in Hazel-Atlas containers included vegetables, fruits, fruit and vegetable juices, catsup, vinegar, syrup, salad dressing, jams, preserves, pickles, mayonnaise,

maraschino cherries, olives, mustard, honey, peanut butter, and beef steak (R. 358–360, 362–363).

The record specifically demonstrates competition between Continental and Hazel-Atlas in seeking to sell containers to pack fruits and vegetables.[47] Moreover, Continental collected data on the comparative costs of metal and glass containers for packaged syrups (GX 400A, 401, R. 2536, 2541–2544) and on the market for peanut butter in cans (GX 402, R. 2544–2553). Indeed, Continental's "Savorlock" can was proposed as a substitute for glass jars in a wide variety of products (GX 404, R. 2553–2563). Consideration was also given by Continental to packing consumer sizes of tomato catsup in metal containers, although it was recognized that it had theretofore been "packed exclusively in glass in retail sizes." This was, nevertheless, considered "a potential market" for Continental (GX 421A, R. 2650–2654). Aerosol metal containers, a market which Continental believed was rapidly expanding, were also promoted for barbecue sauce, catsup, chocolate syrup, salad dressings, and whipped toppings (GX 423–427, 806, R. 185, 2654–2670, 3036–3042).

Thus, as forcefully shown by the activities of Continental and Hazel-Atlas themselves, and by their respective trade associations, there was substantial present and potential competition between the merging firms and between glass and metal container manufacturers for the business of the food canning industry

[47] Continental: GX 400; R. 2519-2528; GX 400A, R. 2534. Hazel-Atlas: R. 362.

and of the packers making up this vast market. Containers for the food canning industry, *i.e.*, those which are sold to pack hermetically sealed and heat sterilized foods, therefore constitute a line of commerce for Section 7 purposes.

B. THE MERGER MAY SUBSTANTIALLY LESSEN COMPETITION IN THIS MARKET BECAUSE IT RESULTS IN A SINGLE FIRM WITH AN UNDUE MARKET SHARE AND SIGNIFICANTLY INCREASES CONCENTRATION

Section 7 requires a determination whether, in any of the relevant lines of commerce, "the effect of [the] acquisition may be substantially to lessen competition * * *." This Court has observed that in making the statutory determination, "[t]he market share which companies may control by merging is one of the most important factors to be considered" (*Brown Shoe Co.* v. *United States*, 370 U.S. 294, 343), and that, in very large mergers, the government's case may be established on the basis of market share percentages alone: "[A] merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined * * *" (*United States* v. *Philadelphia Bank*, 374 U.S. 321, 363). We submit that on the present record the illegality of this merger may be established on the basis of such market share data showing the impact upon the production and sale of containers for food canning.

Customarily, market shares are derived directly from statistics as to sales of the merging companies

within the relevant market, and the total of such sales by all competing companies. This provides a "meaningful base" to reflect the commercial realities prior to the merger.[48] The approach to such statistics must necessarily be a practical one, if Section 7 litigation is to remain manageable. Thus, this Court in *Brown Shoe* approved the reliance upon a market sample and stressed that "in cases of this type precision in detail is less important than the accuracy of the broad picture presented" (370 U.S. at 340–343, and fn. 69, p. 342). In *United States* v. *Philadelphia National Bank*, the Court acknowledged that it had no precise market share data dealing with all banking business derived from the particular relevant geographic market; it took the available statistics, which reflected the business of banks located only within the market and did not specify the source of their business, and made practical adjustments and allowances to arrive at a fair "conservative estimate" of the companies' market position (374 U.S. at 364, fn. 40).

This record does not contain precise statistics dealing with the production and sale of all containers used by food canners in packing hermetically sealed, heat-sterilized foods. No such statistics appear to

[48] "Although the sum of the parties' pre-existing shares of the market will normally equal their combined share of the immediate post-merger market, we recognize that this share need not remain stable in the future. Nevertheless, such statistics provide a graphic picture of the immediate impact of a merger, and, as such, also provide a meaningful base upon which to build conclusions of the probable future effects of the merger." *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 343, fn. 70. See *Crown Zellerbach Corp.* v. *Federal Trade Commission*, 296 F. 2d 800 (C.A. 9), certiorari denied, 370 U.S. 937.

be available.[49] Consequently, there are no precise data concerning the merging firms' shares of this relevant product market. However, this gap should not prevent this Court from judging the merits of the merger by the available meaningful percentages.

Introduced into evidence at the trial was a table listing, in thousands of units and by percentages, the total shipments of glass, and metal food containers within the continental United States in 1955, 1956 and 1957 (GX 801(3c), R. 2969).[50] The district court correctly observed that these statistics included glass and metal containers used for food generally "and were not limited to containers for foods which were heat sterilized and hermetically sealed" (R. 1638). However, we believe that these statistics, which are the only ones available, provide an accurate enough measure of the shares of the food "canning" market held in 1955 by each of the leading firms in the glass and metal container industries to test the legality of this merger. This is because the evidence pertaining to these industries demonstrates, as the district court

[49] The Census Bureau does not collect figures for this end-use of metal and glass containers. See the Census categories listed by the district court, R. 1587–1589.

[50] The data on glass container shipments were drawn from industry reports of shipments, by units of containers, to the Bureau of the Census and to the Glass Container Manufacturers' Institute (GX 801; R. 2956). Metal container shipments are reported to the Bureau of the Census by area measurement of steel plates consumed in the manufacture. Through the use of conversion figures of the Census Bureau and the Can Manufacturers Institute, these statistics were converted to units of containers. The computations were explained at the trial (R. 1194–1315, 1320–1322, 1327–1447; See GX 1202, 1205; R. 3181–3211, 1586–1587, fn. 26).

found, that there is a sufficient flexibility of manufacture and use so that each of these firms could as readily produce containers for hermetically sealed heat-sterilized foods as for other types of packaged food products and that, indeed, the identical containers are often used for both of these purposes (R. 86, 89–90, 103, 411, 1587–1588, 1641, 1643). Consequently, there is no reason to believe that either Continental or Hazel-Atlas produced and sold any lesser percentage of "canned" food containers than of total food containers in 1955. Indeed it is noteworthy that both these firms had substantially the same percentage of the food container production in that year as they had of the *total* "food, non-food, beer, soft drink and beverage" container production during 1955 (GX 801(3b), R. 2968). This further supports the inference that leading producers in each of these industries were able to sell their products in roughly equal shares among the major possible end uses because of the flexibility of manufacture and use.[51] Moreover, as has previously been shown

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[51] The total container production figures are Continental 21.9 percent, Hazel-Atlas 3.1 percent (R. 2967). It should be noted that the adaptability of all container production to the satisfaction of the needs of food canners makes these total production figures independently relevant, since they provide a meaningful estimate of the potential scope of the choices available to food canners. That such potential choices among metal and glass container manufacturers are not merely theoretical, but are actually available to food canners, is shown by the further findings of the district court, that there are no specialized vendors of containers for food purposes, that such containers were not sold or shipped differently from containers for other uses and that packers ordinarily use multiple sources of supply (R. 1641, 1643).

(pp. 42–47, *supra*), the record reflects affirmatively that both Continental and Hazel-Atlas were heavily engaged in providing containers for the food "canning" industry. Hence it is fair to infer—particularly in the absence of any proof by the appellees—that a large portion of the food containers produced by these firms were used for food "canning."

If these percentages are accepted, as we think they should be, Continental has been shown to have held about 23 percent of this product market prior to the merger, and Hazel-Atlas has been shown to have held about 3 percent. The merger therefore raised Continental's share of the market to about 26 percent, an increase of more than 12 percent. Before the merger Continental was the second largest manufacturer of containers suitable for food canning; Hazel-Atlas was the sixth. The other industry leaders were American Can Company (29 percent), Owens-Illinois Glass Company (7.9 percent), Anchor-Hocking Glass Company (4 percent), and National Can Company (3 percent). Accordingly, the effect of the acquisition was to increase the total share of the three largest firms by about 5 percent of their prior total percentage share; after the merger they held 63 percent of this product market.

We submit that such an increase in market shares is sufficient to "raise an inference that the effect of the contemplated merger of appellees may be substantially to lessen competition" in the manufacture and sale of containers for food canning, since it "produces a firm controlling an undue percentage share of the relevant market and results in a significant increase in the concentration of firms in that market." *United*

States v. *Philadelphia National Bank,* 374 U.S. at 363, 365.

In *Philadelphia Bank,* the Court, dealing with the market shares before it, held that a 30 percent market share held by the merged company was an "undue" percentage, and that an increase of more than 33 percent in the concentration of business in the two largest companies was a "significant" increase (374 U.S. at 364–365). Noting that various writers had proposed more rigorous tests under Section 7,[52] the Court stressed that a less substantial increase than was present in *Philadelphia Bank* would not *ipso facto* render the merger lawful (374 U.S. at 364, fn. 41). It pointed out that "if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great" (374 U.S. at 365, fn. 42).

While the percentages here are smaller than in *Philadelphia Bank,* we believe they are sufficient to give rise to the inference of illegality. As has been more fully discussed at pp. 33–36, *supra,* this merger takes place in industries in which oligopolistic structures are already far advanced and well entrenched. Moreover, the impact of interindustry competition to counteract the anticompetitive effects of concentration within an industry (pp. 16–17, 19–21, *supra*) is particularly marked in the food canning industry, in which

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[52] The Court noted the views of several commentators who suggest that any acquisition by a firm controlling 20 or 25 percent of a market be considered presumptively unlawful. Another economist urges that an increase in market concentration of 7 or 8 percent should require the same result. *United States* v. *Philadelphia National Bank,* 374 U.S. at 364, fn. 41.

competitive innovation and price bargaining has occurred which might not have resulted without interindustry competition. Finally, further mergers of this sort between metal and glass manufacturers would have the accelerated anticompetitive consequence of combining two competing leaders in their respective oligopolistic industries.

Preventing such results in their "incipiency" was the Congressional intent in adopting the amended Section 7. In these circumstances, we believe that the market shares in food canning resulting from this merger were sufficient to raise an inference that competition would be substantially lessened. Accordingly, we believe that the government has met its burden of showing that the merger was proscribed because of its anticompetitive impact, even if the only line of commerce in which such effects are evaluated is the production and sale of containers for the food canning industry.

CONCLUSION

For the foregoing reasons the judgment below should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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MARCH 1964

APPENDIX

The exhibits cited in this brief were admitted in the record as follows:

Government Exhibit:	Original Transcript Page
GX 1	2329–2330
3	2329–2330
14	2333
31	2335
33	2098
42	2139
43–55	2146
56	2151
62–64	2154
65–71	2157
73	2158
80–82	2167–2168
84	2169
85–131	2127
133	1625–1626
138	1710
145	1657
147	1671
148	1671
156	1672
158	1674
166	1674
170B–177	614, 626
235c	1928
235d	1932
317	122, 172
318	125–126, 772
348–348h	674–676
349A	1939
349B	1939
363	1319–1321
364	1339, 1342
400A	1637
401	3545

Government Exhibit—Continued.	Original Transcript Page
GX 402	1908
404	1769
405	1774
405A	614, 626
406	3547
407	3547–3549
408	1776
409	1778
411	3550
412	3553
413	3553
415	3555
415B	2003
415C	1449
416	3556
417	1862
419A–C	1417
420	3559
421A	1766
422	3560
423–427	614, 626
429	1877
434	1449–1456
436	1458
438	3561
439	1804
440	1886
440A	1881
441	1891
442	3562
445	1747
446	2000
448	614, 626
543	614, 626
558	614, 626
588	614, 626
589	1864
600	3563
600B	1897
601	1899

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